September 28, 2007

Commission's Secretary
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: WC Docket No. 06-210
CCB/CPD 96-20

FURTHER CERTIFIED COMMENTS OF COMBINED COMPANIES INC.

I Larry G. Shipp, who at all times relevant to the issues raised by the above captioned action, was president of Combined Companies, Inc. (CCI). Therefore, having knowledge of the undisputed facts and events now before the Federal Communications Commission (FCC), and as well having knowledge of specific tariffs cited within petitioners recent FCC filings, wish to certify to the following:

1. When CCI and Public Service Enterprises (PSE) ordered its "traffic only" transfer, full compliance with AT&T FCC Tariff No. 2, Section 2.1.8, the only variable that CCI and PSE needed to inform AT&T about was whether a plan transfer or a "traffic only" transfer was being ordered. As the DC Circuit understood, because 2.1.8 allowed--- and the AT&T issued Transfer of Service Form (TSA) utilized--- the same AT&T TSA form for either a plan transfer, or "traffic only" transfer notations were placed on the AT&T TSA to make sure AT&T staff got the order correct.

2. The AT&T TSA coupled with PSE's cover letter clearly shows that neither CCI nor PSE stipulated or imposed any modification to 2.1.8's requirements regarding **<u>which obligations transfer</u>** on a "traffic only" transfer. In fact PSE in its cover letter that went in with the AT&T TSA forms instructed AT&T that it was requesting a proper order.

The FCC should see on page 4 of exhibit F to petitioners 9/27/06 comments which PSE states:

> Please find a **<u>properly executed</u>** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

3. Months after AT&T did not process the properly executed "traffic only" transfer, AT&T, CCI PSE and petitioners all agreed before the NJ District Court that under section 2.1.8, shortfall and termination obligations do not transfer to PSE as per 3.3.1.Q bullet 10, as these obligations were the responsibility of the remaining "Customer" CCI. AT&T permanently denied the "traffic only" transfer not based upon a violation of 2.1.8's obligations clause, but under AT&T's alleged violation of the tariffs Fraudulent Use sections. See tariff section 3.3.1.Q bullet 10 in petitioners exhibit D filed 9/27/06.

4. The case record shows that AT&T agreed before Judge Politan in 1995, 1996, and before the FCC 2003 and, as well, before the DC Circuit in 2005, that under 2.1.8 CCI's revenue commitment including shortfall and termination obligations <u>do not transfer on a "traffic only" transfer</u>. AT&T changed its position on which obligations transfer after the DC Circuit Decision. The injunction brought by PSE, CCI and petitioners against AT&T was simply to transfer "traffic only" and keep its plan. The injunction was not to demand that AT&T modify or alter which obligations transfer under 2.1.8.on its "traffic only" transfer.

5. It is a fact that a) the DC Circuit did not find any fault with the FCC's decision that AT&T used an illegal remedy in applying its fraudulent use provisions and b) the DC Circuit understood 2.1.8 allowed "traffic only" transfers. However, after the DC Circuit Decision AT&T then switched its position and now asserts that the still remaining CSTPII/RVPP customer (CCI's) revenue commitment and shortfall and termination liability transfers to transferee PSE on a "traffic only" transfer.

6. It was CCI's, PSE's, and petitioners position that all it submitted, as they we were lawfully allowed to do so under the tariffs, <u>was a "traffic only" transfer</u>; accordingly CCI and PSE signed the AT&T authorized Transfer of Service Agreement (TSA) form and agreed to transfer and assume "all obligations of the **<u>former</u>** customer," as per 2.1.8. Therefore it is undisputed that the parties (CCI and PSE) agreed to transfer whichever obligations were required by 2.1.8 to be transferred.

7. Based upon AT&T's past practices and AT&T own tariff interpretation (prior to the DC Circuit Decision) for 2.1.8's obligations section and joint and several liability section, CCI and PSE understood that since CCI remained AT&T's **<u>customer</u>** by not transferring the plan, CCI would be responsible shortfall and termination liability as per tariff section 3.3.1Q para 10. (see exhibit D in petitioners 9/27/06 FCC comments.

8. As petitioners have exhibited section 2.1.8 only requires the transferee (PSE) to assume "all obligations of the <u>"former"</u> customer" and not "all obligations of the <u>"customer."</u> – which is a SIGNIFICANT LEGAL DISTINCTION. CCI did not transfer the plan and thus still remained an AT&T "<u>Customer", not a former customer. This had always been AT&T's interpretation of 2.1.8 prior to the 2005 DC Circuit decision.</u>

The tariff is clear at 3.3.1.Q para 10. See petitioners' exhibit D in its 9/27/06 filing:

> **<u>Shortfall and/or termination liability</u>** are the responsibility of the **<u>Customer.</u>** Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the **<u>individual locations designated by the Customer for inclusion under the plan</u>**. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations **<u>under the plan.</u>**

See here as "Exhibit A" which is part of this certification the definition under the Tariff No. 2 of a Customer:

> **Customer - <u>the person or legal entity which orders service</u>**

There is only one Customer. The customer remained CCI as it remained the owner of the non transferred Customer Specific Term Plan/Revenue Volume Pricing (CSTP II/RVPP) Plan, which is defined as an AT&T service under the tariff.

> **3.3.1. Components and Rates (continued)**
>
> **Q. AT&T 800 Customer Specific Term Plan II -** The AT&T 800 Customer Specific Term Plan II (CSTP II) is a term plan, in lieu of all other specific term plans and/or **service** discounts, that offers the Customer term plan discounts applicable to usage **for the Customer's AT&T 800 Service**

Only one customer can remain in control of a plan as the tariff at 3.3.1.Q para 10 states the Customer designates:

> individual locations **designated by the Customer** for inclusion under the plan

The Customer also controls its plan by adding or deleting accounts as per 3.3.1.Q bullet 4.

See petitioners exhibit D in 9/27/06 filing which is tariff section 3.3.1.Q

> The **Customer** may add or delete an AT&T 800 Service or AT&T Custom 800 Service covered **under the plan.**

9. The Customer can also change service on the accounts by utilizing 2.1.8. The **Former** Customer has no control over a plan. The **Former** Customer can not add or delete an account nor change service for locations under its plan. The **Former** Customer becomes a former customer by transferring its plan and no longer being an AT&T customer.

10. As per section 2.1.8 the "the **former** customer **remains** jointly and severally liable for that which it designates for transfer. Thus CCI remained jointly and severally liable on the locations designated for transfer as a **former** customer, but remained obligated as a Customer on the locations CCI did not transfer. The remaining jointly and severally liable provision is only enacted against the **Former** Customer to **remain** liable on what is transferred. The word: ***"remains"*** obviously means that the transferor was a customer. When the transferor transferred its plan and thus its S&T customer liability the transferor gave up its customer status and became a **FORMER** Customer of the plan but as per 2.1.8 had to **remain** jointly and severally liable with the new customer for the S&T liability. This happens in a plan transfer as the Inga to CCI plan transfer.

11. The CSTP II/RVPP plan was not transferred so CCI continued to be an AT&T Customer—not a former customer—and must continue to be responsible for shortfall and termination liability as per CSTPII general definitions 3.3.1.Q para number 10.

12. The following is additional tariff evidence and AT&T concessions showing the CUSTOMER continues to be the CSTPII/RVPP plan holder for AT&T's Wide Area Transmission **Service** (WATS).

As long as the Main Billed account does not transfer the Customer's service (in this instance the service is the plan) does not transfer. See exhibit A in petitioners 8/23/07 filing page 19: which is AT&T tariff No 2 section 2.9. DEFINITIONS.

See the Definition for Main Billed Account:

> **Main Billed Account** - **an account associated with a Customer's *service*** to which WATS charges are billed.

See FCC filing Date Received/Adopted: 05/22/07 at exhibit D: AT&T counsel Mr Whitmer:

> Whitmer: Mr. Inga, you know, do you not, that if the service, except for the **home account**—or Mr. Yeskoo called it the **"lead account"**—is transferred to PSE, **the shortfall and termination liabilities remain** with Winback & Conserve, isn't that correct?

13. This is correct. Mr Whitmer was confirming that under 2.1.8 petitioner Winback as the "former customer" in its **plan** transfer from Winback to CCI would remain jointly and severally liable for the shortfall and termination liability. Of course the FCC's 2003 Decision also understood this as it stated the Inga Companies remained jointly and severally liable for the S&T liability with CCI. **If** CCI transferred the **Main Billed Account** (which would indicate the plan transferred) to PSE then CCI would only then become the FORMER Customer and remain jointly and severally liable for the shortfall and termination liability and PSE would become the New Customer of record and Winback would no longer remain jointly and severally liable under the tariff for the shortfall and termination liability, as 2.1.8 only deals with one former customer and one new customer not multiple past generations of former customers.

14. AT&T also concedes that the tariff defines the **"Customer"** not the "former customer" as responsible for shortfall and termination liability pointing in its footnote to Tariff section 3.3.1.Q.para 10:

See petitioners 8/23/07 filing page 2 Exhibit C which is AT&T's April 15th 2003 FCC Reply Comments on Page 4:

> As AT&T's **customers-of-record**, the Petitioners were responsible for the tariffed shortfall and termination charges. [AT&T FOOTNOTE 3 HERE]
>
> ______________________________
>
> Footnote 3
> **Section 3.3.1.Q of AT&T Tariff F.C.C. No. 2**; *see also*, AT&T Corp. Further Comments, filed April 2, 2003 ("AT&T's 2003 Further Comments") at 7-8.

AT&T does not assert that PSE is responsible for shortfall and termination charges.

AT&T then concedes as **"customers"** shortfall and termination obligations do transfer on a PLAN transfer:

> Moreover, as AT&T has already demonstrated, as AT&T's **customers-of-record** Petitioners were precluded under the governing tariff from transferring their CSTP II ***"Plans"*** to PSE unless PSE agreed to assume all of Petitioner's obligations under those

same plans, including tariffed shortfall and termination charges.[AT&T Footnote 4 HERE]

Footnote 4
Sections 2.1.8.B of AT&T Tariff F.C.C. No. 2; *see also*, Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration, filed August 26, 1996 ("AT&T's 1996 Initial Comments") at 10-11.

AT&T is referring to the "traffic only" transfer between CCI and PSE. Because the Inga Companies were co-petitioners with CCI, the AT&T excerpts use the word "petitioner's" to actually explain what CCI could or couldn't do with its traffic and plans with PSE under the tariff.

See exhibit Z in petitioners 9/27/06 filing which is AT&T's comments to the FCC in 2003 as the same three AT&T counsel interpret 2.1.8's remaining jointly and severally liable provision:

> Moreover, as AT&T's **customers** for all of the locations and all of the traffic generated **under the tariffed plans,** in terms of the *transfer* of such accounts the Petitioners would, **but for** the attempt to bifurcate the traffic from the **underlying plans**, **remain jointly and severally liable** with the **new customer** for all obligations existent at the time of the transfer. May 19th, 1995 Order at 6, AT&T Tariff **F.C.C. No. 2 Section 2.1.8.**

Notice above that AT&T again defines CCI as the "customer" not the **former** customer. As per 2.1.8 the joint and several liability provision is only applied upon the **former** customer. AT&T concedes that due to the fact that the plan is not transferring PSE **does not become the new customer** and CCI thus the former customer which would remain jointly and severally liable. Again AT&T is correctly associating CSTPII/RVPP plan ownership as remaining an AT&T customer.

See petitioners Date Received/Adopted: 09/07/07 exhibit A page 2 which is tariff section 3.3.1 general definitions of a CSTPII/RVPP plan.

> Q. AT&T 800 Customer Specific Term Plan II - The AT&T 800 Customer Specific Term Plan II (CSTP II) is a term plan, in lieu of all other specific term plans and/or service discounts that offers the **Customer** term plan discounts applicable to usage for the **Customer's** AT&T 800 Service-

Again the plan is associated with the Customer not a **former** customer.

15. Either the transferor (CCI) retains the plan and is still an AT&T Customer in control of its Customer Specific Term PlanII; or if the plan is transferred then the transferor (CCI) would be a "**Former** Customer." The term **Former** Customer obviously indicates that the Customer **formerly** was an AT&T customer. If the plan does not transfer the transferor can not be labeled a **former** Customer. On a "traffic only" transfer the transferor customer remains in control of the accounts transferred up until the "time of transfer or assignment"- i.e. until the transfer actually goes through. When the transfer goes through the transferor (now the former customer) loses control of the accounts transferred. The obligations provision and the joint and several liability

provisions are applicable only to the **former** customer and only "at the time of transfer or assignment."

16. In January 1995 AT&T interpreted the Term "Former Customer" to mean the transferor was no longer an AT&T Customer as of the Effective Date of the transfer. The Commission can later see in AT&T's November 1995 and May 1996 versions of 2.1.8 that AT&T further elaborated on the difference between a "Customer" versus a "Former" Customer. See petitioners 9/27/06 filing at exhibit P for the November 1995 2.1.8 and also see petitioners 1/31/07 FCC filing at exhibit C page 163 the May 1996 version of 2.1.8.

17. The January 1995 2.1.8 para B states: "all obligations of the former Customer at the time of transfer" The AT&T November 1995 and May 1996, 2.1.8 versions AT&T cleverly changes the word "Former" Customer to "Current" Customer then explicitly defines at paragraph D that:

> **The Current Customer <u>will no longer be AT&T's Customer for the service</u> as of the Effective Date of the transfer**,

18. Here is the November 1995 and May 1996 versions of 2.1.8 in which AT&T further explained that the obligations required to be CCI transferred/PSE assumed are only "for the service" being transferred as of the Effective Date of the transfer:

> B. The New Customer notifies AT&T in writing (using the same Transfer of Service form signed by the Current Customer)* **<u>that it agrees to assume all obligations of the "Current" Customer as of the "Effective Date of the transfer"</u>**. These obligations include, for example: all outstanding indebtedness for the service, the unexpired portion of any applicable minimum payment period(s), the unexpired portion of any term of service and usage and/or revenue commitment(s), and any applicable shortfall or termination liability(ies).
>
> C. The service is not interrupted at the time the transfer or assignment is made.
>
> D. **<u>The Current Customer will no longer be AT&T's Customer for the service as of the Effective Date of the transfer</u>**, which will be the earlier of the date on which AT&T provides to the New Customer a written acceptance of the transfer or assignment, or the fifteenth day after AT&T receives a fully executed original of the Transfer of Service form,

Instead of using just the word "FORMER" as in the January 1995 2.1.8 version AT&T further elaborated in subsequent 2.1.8 versions that obligations are only required for the service (plan or "traffic only") designated for transfer.

19. Since under 2.1.8 CCI was only required to transfer and PSE was only required to assume "all obligations of the **former** customer at the time of transfer or assignment" and since

transferor CCI was not a "former customer" of the CSTPII/RVPP service **<u>plan</u>**, the shortfall and termination liability were **<u>not</u>** required under 2.1.8 to be transferred by CCI and assumed by PSE.

20. PSE <u>did assume as 2.1.8 indicates and requires</u>, and the AT&T authorized TSA evidences the 2 enumerated obligations:

> 1) all outstanding indebtedness for the service and the 2) unexpired portion of any minimum applicable payment period.

CCI as a **<u>former</u>** customer on the locations it designated for transfer remained jointly and severally liable for these two enumerated obligations within 2.1.8.

21. It is an undeniable fact that CCI **<u>did transfer</u>** and PSE **<u>did assume</u>** "all obligations of the former customer".

The point is that given the fact that CCI did transfer and PSE did assume "all obligations of the former customer", CCI and PSE were explicitly acting lawfully in accordance with section 2.1.8. So no matter what the FCC decides as to which obligations transfer the order was done in compliance with section 2.1.8.

<u>Further Evidence that Obligations Only Pertain to What is Designated for Transfer</u>

22. Under AT&T's illogical post DC Circuit interpretation for section 2.1.8 the transferee (PSE) is responsible for "all obligations" of the remaining customer – not the **<u>former</u>** customer, despite <u>what the tariff explicitly states</u>. Under AT&T's logic PSE would thus be responsible for indebtedness on accounts that are **not** transferred to PSE.

The tariff does not agree with AT&T nor does the AT&T TSA form used to enact 2.1.8. A careful reading of the AT&T authorized and issued Transfer of Service Agreement (TSA) Forms state in the opening paragraph:

> **<u>Former</u>** Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with the New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers "**<u>specified above"</u>** and (2) the unexpired portion of any applicable minimum payment period(s).

23. See all TSA's within petitioners exhibit F in petitioners 9/27/06 filing. Also see additional AT&T authorized and issued AT&T TSA's processed by AT&T at exhibit Y in petitioners 9/27/06 filing. As will be evidenced below, AT&T explained to the DC Circuit that the AT&T TSA's used were its **<u>standard</u>** TSA's.

24. Obviously the TSA phrase **<u>"specified above"</u>** clearly indicates that AT&T conceded that 2.1.8's remaining jointly and severally liable provision only pertained to the service designated for transfer. This is also perfectly consistent with the fact that 2.1.8's remaining jointly and severally liable provision and all obligations provision only pertains to the **<u>FORMER</u>** Customer not the Customer.

25. Since the plan does not transfer CCI is not a former customer. Therefore the remaining jointly and severally liable provision does not relate to remaining jointly and severally liable for shortfall and termination obligations because the shortfall and termination obligations do not transfer. The remaining jointly and severally liable provision on a "traffic only" transfer only pertain to the actual accounts designated for transfer, not the accounts that don't transfer.

This undeniable fact obviously is in direct conflict with AT&T's post DC Circuit "all obligations" theory that short quotes 2.1.8 and spins what 2.1.8 explicitly states.

26. This is why 2.1.8 also limits the obligations to "all obligations of the **former** customer" and not all obligations of the Customer.

AT&T's OTHER Inconsistencies That Support Petitioners

27. Here as **"**Exhibit B" with this certification is what AT&T said in its initial brief to the DC Circuit page 1

> During the period at issue, AT&T's 800 service was provided under a tariff that allowed the "transfer or assignment" of 800 service to a new customer only if the new customer "agrees to assume all obligations of the **[existing] customer** at the time of the transfer."

AT&T intentionally changed the tariffed word "former" to "existing" and placed brackets around [existing]. There is important legal distinct difference between the control and type of obligations that an "existing" customer has as compared to a "former" customer. This demonstrates that AT&T was well aware that the word "former" limited the obligations and thus AT&T intentionally changed the critical "limiting" word.

28, Here as our "Exhibit C" with this certification is AT&T's statements within initial brief to the DC Circuit page 7

> **3. The Inga Companies-CCI-PSE Transactions.** Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., and 800 Discounts, Inc. were all **formerly** resellers of AT&T's 800 services under nine CSTP II **plans**. These companies are referred to collectively as the "Inga Companies" because they were all owned and controlled by Mr. Alfonse Inga. *Id.* at ¶ 1.

The above quote is correct. Since the Inga Companies transferred its **plans** to CCI the Inga Companies were "formerly" resellers of AT&T services under the nine CSTPII plans. Since CCI did not transfer its plans to PSE CCI remained an AT&T customer.

29. Here as our "Exhibit D" is AT&T's further remarks within its initial brief to the DC Circuit page 8

> As a result, the Inga Companies' nine CSTP II plans were transferred to CCI, and the FCC assumed for purposes of its *Declaratory Ruling* that "CCI was the legitimate transferee of the Inga Companies' CSTP

> II/RVPP plans and the **customer of AT&T**." *Declaratory Ruling* ¶ 3 & n.19.

Note, AT&T concedes CCI was AT&T's **customer** after the Inga petitioners **plan** transfers to CCI.

30. Here as "Exhibit E" with this certification is AT&T's statements within its initial brief to the DC Circuit page 9:

> At the bottom of each of these transfer of service forms, a handwritten notation requested that AT&T move the **"traffic only" on each plan** from CCI to PSE **and keep the plan itself**, including all associated commitments and liabilities, with CCI. *Id.* CCI and PSE thereby sought to move all of the revenue producing telephone numbers in the nine CSTP II plans to PSE, but **leave all of the obligations arising under those plans with CCI.**

This AT&T statement is important for a couple of reasons. First of all it recognizes that the "Traffic only" statement is reference to moving "traffic only" not the plan. Not "traffic only"- No obligations. AT&T after 10 years came up with a "novel" by inaccurate assertion that "Traffic only" did not mean transfer "traffic only" not the plan; it meant "Traffic only" don't transfer any obligations. The FCC can see at exhibit F in petitioner's 9/27/06 filing that AT&T actually short quoted what is stated on the AT&T TSA forms down to "Traffic only", then twisted the statement. The instructional notation was due to the fact that 2.1.8 and the AT&T issued TSA allows both "traffic only" transfers and plan transfers and is actually part of a longer sentence instructing AT&T which accounts to transfer.

Secondly the above AT&T statement again notes that the CCI-PSE "traffic only" transfer would **"leave all of the obligations arising under those plans with CCI."** The obligations AT&T is referencing are the shortfall and termination obligations (3.3.1.Q bullet 10 ex D petitioners 9/27/06 filing). The customers S&T liability are based upon the plans mandatory revenue commitment. See exhibit A pages 7-8 within petitioners Date Received/Adopted: 09/07/07 filing

…. and

It is a fact that AT&T did mislead the DC Circuit when it states that CCI transferred "all of the revenue producing telephone numbers." As the AT&T TSA's indicate CCI and PSE left the Main Billed Account on the CCI plan. CCI did not want to discontinue the CSTPII by transferring **ALL** the accounts. See tariff section 5 in petitioners exhibit CC within 9/27/06 FCCC Comments.

31. Here as my "Exhibit F" is a statement from AT&T's initial brief to the DC Circuit page 9 fn. 8

> AT&T also initially objected to this transfer on the ground that **CCI was not the customer of record for the plans, and hence was not authorized to transfer the traffic.** *Declaratory Ruling* ¶ 4. That objection was mooted when the plans were transferred from the Inga Companies to CCI. AT&T's initial brief to the DC Circuit page 9. Second, AT&T objected that the proposed "traffic only" transfer **violated the "Fraudulent Use" provision in Section 2.2.4 of the tariff.**

> **In particular, because CCI would have transferred all the revenue producing telephone numbers to PSE without any of the accompanying obligations of the customer under the CSTP II plans,** and because CCI would have had no revenue or other means of meeting its obligations under those plans, the proposed transfer had the purpose and effect of avoiding, in whole or in part, **liability for tariffed shortfall and/or early termination charges under the plans. *Id.***

In the first highlighted section above AT&T confirms that only a **customer of record** i.e (customer) is authorized to do a "traffic only" transfer from its plan. This was also confirmed by AT&T account manger Annette Mchaffey in her December 10th 1990 letter to petitioners. See exhibit A in the Date Received/Adopted: 09/05/07. Only a customer can control the adding and deleting of accounts (3.3.1.Q bullet 4) or the changing customer of record of an end-user location by transferring the end-user (as per 2.1.8).

In the second highlighted section -- because the plans accompanying obligations stay with plan holder CCI --- AT&T erroneously claims that the "traffic only" transfer violated its fraudulent Use section 2.2.4. AT&T did not object under 2.1.8 as AT&T recognized under 2.1.8 the customer plan obligations (S&T liability) do not transfer without the plan.

In the third highlighted section AT&T states that the liability is for **"tariffed" shortfall and/or early termination charges under the plans.** AT&T is basically quoting tariff section 3.3.1.Q para 10 in petitioners exhibit D filed 9/27/06._

32. Here as "Exhibit G" to this certification is AT&T's statements within initial brief to the DC Circuit page 18-19

> Further, that the proposed transfer from CCI to PSE did not meet the requirements of Section 2.1.8 is confirmed by the fact that CCI and PSE had to modify the **standard form** by adding handwritten notations requesting AT&T to move the **"traffic only"** for **each of the telephone numbers** that they sought to transfer **while leaving the associated CSTP II plans and their attendant obligations "intact" with CCI.**

Again AT&T attempted to mislead the DC Circuit by asserting the instructional notations to do a "traffic only" transfer as opposed to a plan transfer were an attempt to "modify the **standard** form," (i.e the TSA), which was issued and authorized by AT&T. What the Commission should recognize in the above AT&T's statement is that AT&T again recognized CCI's instructions to transfer "traffic only" was done SOLELY to leave:

> "**the associated "CSTP II plans"** and their attendant obligations "intact" with CCI."

Yes, AT&T understood the instructional notations were to transfer "Traffic only" **not the CSTPII plan**. AT&T then further asserts that the CSTPII **plans** have "attendant obligations". Neither CCI nor PSE stated: "Transfer "traffic only" but don't transfer any obligations".

The FCC Decision (exhibit B pg.3 to petitioner's 9/27/06 comments) also understood what the notations instructed AT&T to do was move accounts **not the plan**.

> At the bottom of each TSA**,** in handwriting, these parties directed AT&T to move the "Traffic Only" **on each plan** to PSE. The January 13th cover letter, under which these nine TSA's were forwarded, directs AT&T to "**move the locations associated with these plans [but] not in any way to discontinue the plans**." (Exhibit H to petition). In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSTPII/RVPP plans, **but not to move the actual plans themselves.**

33. Whatever obligations transfer on a "traffic only" transfer were expected to be transferred by CCI and assumed by PSE on the "traffic only" transfer ordered.

Mr. Carpenter again explaining that all 2.1.8 is doing is changing the customer of record for the services that are being transferred.

Carpenter DC Circuit Oral page 18-19

> MR. CARPENTER: A change of service is not a change of location.
> JUDGE GINSBURG: Well, I thought you were telling me earlier --
> MR. CARPENTER: A transfer of service is not a transfer of location.
> JUDGE GINSBURG: Okay.
> MR. CARPENTER: **A transfer of service is just the "change in the customer of record" that's entitled to have calls delivered to a location. That's all a transfer, it's, you know, it says transfer or assignment.**
> JUDGE GINSBURG: Ah, okay, okay.
> MR. CARPENTER: Okay?
> JUDGE GINSBURG: All right. Okay. All right, that makes sense.

Correct! On a "traffic only" transfer, AT&T's customer of record changes from CCI to PSE for the end-user locations designated for transfer.

34. As AT&T's counsel Mr Carpenter explained on page 4 of the DC Circuit oral argument, a transfer or assignment is "**simply changing the customer of record for a service."**

> MR. CARPENTER: What is a service?
> JUDGE GINSBURG: Yes**. It says, 2.1.8 talks about WATS, Wide Area Telephone Service, right?**
> MR. CARPENTER: Right.
> JUDGE GINSBURG: May be transferred or assigned, okay? And then there are, you just used the term "service," I believe, in terms of increasing and decreasing service, is that correct?
> MR. CARPENTER: No, I used, I talked about**, I talk about what a transfer or assignment is**. **It's simply changing the customer of record for a service.**
> JUDGE GINSBURG: Okay, but the transfer or assignment of what?
> MR. CARPENTER: Of WATS service.
> JUDGE GINSBURG: Of service?
> MR. CARPENTER: Yes.

This is correct also. The services that are designated for transfer change their customer of record. The account traffic service also known as locations, or end-users, are transferred to AT&T customer PSE's control. However, since CCI's Wide Area Telephone Service which its (CSTPII/RVPP) plan is not transferring the customer of record for the CSTPII/RVPP service plan does not change. Therefore, because under tariff section 3.3.1Q para 10 "shortfall and termination liability are the responsibility of the customer," the S&T liability remains with the CCI CSTPII/RVPP service plan.

35. Here as CCI's "Exhibit H" is AT&T statements within its reply to FCC before the DC Circuit page 6

> 1. Contrary to the *Order's* holding, Section 2.1.8 squarely "address[es]" and "govern[s]" any transfer or assignment of "WATS, including any associated telephone numbers." It provides that such transfers can occur only if ("provided that") the transferee (here PSE) agrees in writing to assume "(1) all outstanding indebtedness for the service "**at issue"** and (2) the unexpired portion of applicable minimum service periods."

The above AT&T assertion is important because it concedes that on a "traffic only" transfer just the two obligations enumerated within 2.1.8 were to be assumed by PSE. AT&T does not state that the revenue commitment and concomitant shortfall and termination obligations were required to be transferred on the "traffic only" transfer.

Also see AT&T added the words "at issue" to the end of its interpretation for 2.1.8's first enumerated obligation, conceding that the obligations only pertain to what traffic is transferred.

36. Here as our "Exhibit I" is AT&T reply to FCC before the DC Circuit page 8 in which AT&T distinguishes that there is a difference between which obligations transfer on a plan transfer versus a "traffic only" transfer:

> The FCC's contrary claims rest on its mischaracterization of a single sentence from AT&T's Opposition below, which stated: "Section 2.18.B states that a customer may transfer its WATS service (in this case the relevant WATS services are the CSTP II Plans) to a 'new Customer' only if the new customer confirms in writing that it 'agrees to assume *all* obligations of the **former** Customer at the time of transfer or assignment.'" AT&T Opposition, pp. 10-11 (JA 249). This sentence did *not* distinguish between "traffic" and the "plans." Rather, after stating that "in this case the relevant WATS services are the 'CSTP II Plans,'**" it distinguished these "services" from the "obligations" of the former customer**. Even when viewed in isolation, this sentence did not state that Section 2.1.8 **applies "only"** to transfers of entire plans (**with associated obligations**) and **not to transfers of the traffic alone (without these obligations**).

In the above AT&T excerpt AT&T clearly explains that 2.1.8 allows transfers of the "traffic alone" aka "traffic only"-- **without these obligations.** Obviously what AT&T was referring to as the obligations under 2.1.8 that did not have to be transferred on the CCI-PSE "traffic alone" transfer were the shortfall and termination obligations—as just previously AT&T stated that on the CCI-PSE "traffic only" transfer just the 2 obligations actually enumerated within 2.1.8 in Jan 1995 had to be transferred. AT&T explicitly stated to the DC Circuit that it:

distinguished these "services" from the "obligations" of the "former" customer.

Under AT&T's post DC Circuit theory there is no difference as to which obligations transfer. AT&T asserts post DC Circuit Decision that the revenue commitment and S&T liability must transfer on a "traffic only" transfer, by short quoting 2.1.8 to "all obligations".

37. And as our "Exhibit J" herewith is AT&T's statement within its reply to FCC before the DC Circuit page 11:

> The FCC makes tortured arguments that parties' rights and liabilities are different when service is transferred **with the associated liabilities** than when service is **transferred without them.** FCC Br. 19. **This is "true", but irrelevant**.

Petitioner's have exhibited at T in its 9/27/06 filing the FCC's detailed rationale for its 2003 Decision regarding which obligations transfer. The FCC explained why on a "traffic only" transfer the revenue commitment and associated shortfall and termination obligations do not transfer. AT&T in the above excerpt points to this same FCC rationale on page 19 of the FCC's brief. AT&T states that the FCC's brief regarding the obligations analysis **is true,** but irrelevant.

AT&T asserted the FCC's position was true but irrelevant because AT&T was simultaneously misleading the DC Circuit asserting that CCI transferred/PSE assumed **no obligations**. AT&T was willing to agree with the FCC how 2.1.8 was interpreted because it was making up a new tale after 10 years that "traffic only" meant don't transfer any obligations. AT&T was agreeing with the FCC's 2.1.8 rationale of its 2003 Decision regarding which obligations transfer.

38. See section 2.1.8 in petitioners exhibit B (FCC 2003 Decision) filed 9/27/06 on page 6 fn 46. As per 2.1.8 Para A, the Customer is only designated **former** customer status **only** for the WATS (plan or traffic) designated for transfer between the former customer and new customer, which the Company (AT&T) transfers for the 2 parties.

Then at para 2.1.8(b) the obligations are only those of the **former** customer on the WATS accounts designated for transfer and at 2.1.8(c) only the **former** customer remains jointly and severally liable on the WATS accounts designated for transfer. Both section 2.1.8 (b) and 2.1.8 (c) are in affect at the time of transfer or assignment.

The full text of section 2.1.8 is as follows –

> Transfer or Assignment – WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, provided that:
>
> A. The **Customer of record (former Customer)** requests in writing that the Company **transfer or assign WATS** to the new Customer.
>
> B. The new Customer notifies the Company in writing that it agrees to assume **all obligations of the "*former*" Customer** at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).
>
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.

> The transfer or assignment **<u>does not relieve or discharge the "*former*" Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment".</u>** These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s). When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

In 2.1.8(A) the **<u>Customer</u>** of record is being defined as the **<u>Former</u>** customer just as to which WATS service (plan or "traffic only") is being transferred between them.

<u>AT&T's Further Violation of its Tariffs</u>

39. In addition to AT&T's failure to follow its tariffs in matters related to the "traffic only" transfer issue as pointed out above, AT&T similarly failed to follow its tariffs in applying shortfall charges, in amounts NOT allowed by its tariffs (see FCC Tariff No. 2., Section 3.3.1.Q para 10), to the very same CCI customers, within the very same Customer Specific Term Plans which are the subject of petitioners filings before the FCC. AT&T was only able to remove from CCI's end-users the discount afforded by the CSTPII/RVPP plan owner CCI. AT&T exceeded the discount by many times as exhibit NN in petitioners 9/27/06 comments shows.

40. This type of "self-help" relief was unlawful. The FCC has made it clear that AT&T can not rely its remedy if it used an illegal remedy. The FCC's stated and the DC Circuit did not disagree with the FCC's position on illegal remedies. When AT&T permanently denied the "traffic only" transfer instead of the tariff remedy of "temporarily suspending service" AT&T used an illegal remedy, and therefore a remedy upon which AT&T **<u>CAN NOT RELY</u>**. Therefore since AT&T used an illegal remedy in applying shortfall and termination charges AT&T can not rely upon its shortfall and termination charges.

41. Obviously, AT&T can not deny it enacted this illegal remedy. In fact, in acknowledging it, AT&T attempts to excuse its conduct by asserting to the FCC that since AT&T removed the illegally applied charges a month later after all hell broke loose and CCI and petitioners good will was destroyed that AT&T's attempt to fix its illegal remedy should end any claim of the illegal remedy. (AT&T's erroneous argument is once the illegal remedy was fixed – no harm, no foul).

42. This, of course, can not be allowed to stand. AT&T's conduct was willful by its own admissions, as they acknowledge they deliberately applied the charges in excess of that allowed by the tariff; and therefore, without argument, AT&T acknowledges its actions were in direct violation of tariffs they are obligated to follow.

43. The tariff is explicit at section as 3.3.1.Q bullet 10 states:

> **Shortfall and/or termination liability are the responsibility of the Customer.** Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the

> plan**. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.**

AT&T did not just remove the discount amount as the tariffed remedy calls for; rather, AT&T charged amounts that were multiples the entire bills as exhibit NN in the 9/27/06 filing indicates. The FCC understood the incredible commotion this caused as the FCC added the 190 end-user complaints it received to the record, as indicated in the FCC 2003 decision.

FCC 2003 Decision Page 14 footnote 94: See exhibit B in 9/27/06 Comments.

> After receiving AT&T's bills for shortfall charges, 190 of CCI's end users sent letters to the Commission in June and early July of 1996. The Consumer Protection Branch of the Enforcement Division of the Common Carrier Bureau informed these end users that their letters would be treated as **informal comments in this declaratory ruling proceeding.**

44. CCI recognizes that in some instances events may be viewed honestly differently by witnesses to those events. However, the issues before the FCC now, to include the "shortfall issue" are not within that category. AT&T's actions have been shown, through an examination of its tariffs which MUST GUIDE their actions, to be willful and a total disregard for their obligations to CCI.

45. These issues, therefore, can be resolved easily by the FCC by examining what happened factually, against what should have happened, when the facts are viewed against the obligations of the parties to each other as defined by the governing tariffs.

46. There is no dispute, between either the petitioner or respondent in this case as to "what happened". However, there is disagreement as to what the tariffs themselves mean, and how they should be interpreted.

47. And, it is the "interpretation" of these tariffs that brings this matter before the FCC. For, notwithstanding the persuasive briefs of petitioners regarding these tariffs; nor the persuasive briefs of respondents, both vehemently disagreeing with the other, can it be expected a correct interpretation of the tariffs.

48. The FCC must resolve all the issues before it; issues that are undeniably "linked" to each other - issues that have been briefed extensively over the past twelve (12) years before the courts, appellate review boards and the DC Circuit Court. And, issues each the parties themselves (both petitioner and responder) and the court(s), after its review, has stated ONLY the FCC can resolve.

I understand that I am subject to punishment for any intentional misrepresentations.

Respectfully submitted,

//Signed//

Larry G Shipp
On behalf of Combined Companies Inc.